

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTONIO FRAUSTO,

Defendant.

**8:09CR3**

**MEMORANDUM AND ORDER**

This matter is before the court on defendant's motion to appeal in forma pauperis, Filing No. [240](#), and motion for a certificate of appealability, Filing No. [242](#). The court notes that the defendant has proceeded in forma pauperis to date and will grant the motion. The defendant filed a motion to vacate under [28 U.S.C. § 2255](#). Filing No. [226](#). This court found the motion meritless. Filing No. [237](#). Defendant now moves the court to grant him a certificate of appealability.

Before the defendant may appeal the denial of his § 2255 motion, a "Certificate of Appealability" must issue. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the right to appeal the denial of a § 2255 motion is governed by the certificate of appealability requirements of [28 U.S.C. § 2253\(c\)](#). 28 U.S.C. § 2253(c)(2) provides that a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

. . . .

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

[28 U.S.C. § 2253\(c\)](#).

A “substantial showing of the denial of a federal right” requires a demonstration “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” [Slack v. McDaniel](#), 120 S. Ct. 1595, 1603-1604 (2000), citing [Barefoot v. Estelle](#), 103 S. Ct. 3383, 3394 (1983) (which defined the former standard for a certificate of probable cause to appeal) (internal quotation marks omitted). “Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The defendant must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” [Slack](#), 120 S. Ct. at 1604.

Upon review and consideration of the record and the applicable law, the court concludes that the defendant has failed to demonstrate that reasonable jurists would find this court’s ruling debatable or wrong. Therefore, for the reasons stated in the Memorandum and Order denying defendants § 2255 motion, Filing No. [242](#), a certificate of appealability will not issue.

IT IS ORDERED:

1. That a certificate of appealability pursuant to the notice of appeal, Filing No. [242](#), is denied.

2. The defendant's motion to proceed in forma pauperis, Filing No. [240](#), is granted.

3. That the Clerk of Court shall provide a copy of this Memorandum and Order to the Eighth Circuit Court of Appeals.

4. That a copy of this Memorandum and Order shall be mailed to the defendant at his last known address.

Dated this 5<sup>th</sup> day of February, 2013.

BY THE COURT:

s/ Joseph F. Bataillon  
United States District Judge